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Supreme Court, U.S.
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Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Arkansas Supreme Court in the present matter affirmed certification of a sweeping nationwide class action involving millions of class members' state law claims without first requiring any choice of law analysis. The Court recognized that the issue it faced — whether constitutional principles required a choice of law analysis before certification of a nationwide class — was an issue of first impression in Arkansas. The Court also recognized that its decision to certify the nationwide class, without requiring any choice of law analysis, was in direct conflict with decisions in other states.

The question presented in this petition is whether a state court's refusal to consider choice of law before certifying a nationwide class action that is predicated upon varying state laws fails to give full faith and credit to the laws of sister states and deprives litigants of due process by injecting arbitrariness into the proceedings.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is General Motors Corporation. Respondent is Boyd Bryant, both individually and as the representative of a plaintiff class. The nationwide class certified below is as follows:

> "Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in Hat parking brake system utilizing a high force spring clip retainer, that registered his vehicle in any state in the United States.

Petitioner, General Motors Corporation, has no parent corporation. State Street Bank and Trust is the only publicly held company which owns 10% or more of General Motors Corporation's stock.

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Petitioner, General Motors Corporation ("GM"), respectfully prays that a writ of certiorari issue to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Appendix ("App.") at 1a) is not yet reported in the official reporter, but it is reported at *General Motors Corp. v. Bryant*, 2008 Ark. LEXIS 413 (Ark. June 19, 2008), and *General Motors Corp. v. Bryant*, 2008 WL 2447477 (Ark. June 19, 2008). The opinion of the Circuit Court of Miller County, Arkansas (App. at 36a) is unreported.

JURISDICTION

The opinion of the Arkansas Supreme Court was entered on June 19, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this petition are the Due Process and Full Faith and Credit Clauses of the United States Constitution. The Due Process Clause reads: "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const., Amend. XIV, Section 1. The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each state to the Public Acts, Records and Judicial Proceedings of every other state." U.S. Const., Art. IV, Section 1.

STATEMENT OF THE CASE

This case involves the deprivation of due process rights to litigants in a sweeping nationwide class action with at least four million class members because the state court certified the class without first conducting any choice of law analysis. As a result, the state court certified the massive class without any understanding of what facts and legal issues would be relevant as a matter of law to the class certification decision. Had choice of law been addressed, a class could not have been certified because the vastly differing laws of all 50 states and the District of Columbia would have applied, thereby defeating the basic class certification requirements such as "commonality" and "predominance."[1] Thus, the state court's certification decision was not merely error, it was arbitrary in the extreme and, consequently, constitutionally infirm.

1. Factual Background

The motor vehicles at issue are pickup trucks and utilities purchased between 1998 and the present date. They were manufactured at five different plants, for three different GM divisions, at various points over a

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[1] Ark. R. Civ. P. 23, governing the requirements for a class action in Arkansas state courts, is based on and is effectively identical to Fed. R. Civ. P. 23, governing the class action requirements in federal court. Under Ark. R. Civ. P. 23(a) and (b), a class can be certified only if the class is "numerous," there are "common" questions of law or fact, the representative parties claims are "typical," the representative parties will "adequately" protect the class, the common questions "predominate," and a class action would be "superior."

four year period. In late 2000, GM noticed a higher than expected warranty experience with regard to the parking brakes in some of the vehicles. Working with the National Highway Traffic Safety Administration ("NHTSA"), GM concluded that some of the vehicles could develop a condition that might lead to premature park brake wear. Once GM ascertained the source of the potential wear issue in 2002, it developed a warranty repair for any vehicles experiencing a problem.

In its analysis performed for NHTSA, GM concluded that there were no means to predict whether any specific vehicle would experience the condition. Only two percent of the automatic transmission vehicles had required parking brake warranty repairs and these warranty figures varied depending on the model, year, month of build, type of model, and individual consumers usage and maintenance practices.

GM, with NHTSA's approval, issued a recall for the manual transmission vehicles in April 2005. This decision followed a NHTSA study where NHTSA noted that the parking brakes were designed solely "to supplement" other parking mechanisms (such as the "park" function on automatics and the reverse gear on manuals). However, NHTSA's study found that the manual transmission vehicles had a higher chance of a roll-away incident than similar vehicles manufactured by GM's competitors. The same was not true for the automatics, and thus, the automatic transmission vehicles were not recalled.

Boyd Bryant ("Mr. Bryant"), an Arkansas resident, purchased a 2002 Chevrolet Tahoe, with automatic

transmission, from a dealership in Ashdown, Arkansas, on April 4, 2002. The dealer explained to him the recommended maintenance schedule, including periodic inspections of the parking brake. However, between September 2002 (when a warranty repair was available) and mid-2004 (when his warranty expired), he did not have an inspection or service of any type performed and, thus, passed up an opportunity for the warranty repair.

2. The Class Certification Proceedings

After responding to a legal advertisement in a newspaper, Mr. Bryant filed this nationwide class action on February 4, 2005 in the Circuit Court of Miller County, Arkansas. He sought to represent a class of original and subsequent owners of approximately four million 1999 through 2002 pickups and utility vehicles sold in every state in the nation and the District of Columbia from 1998 through the present date. Mr. Bryant alleged that the parking brakes in these vehicles might prematurely fail. For causes of action, Mr. Bryant asserted five state-law based claims: (1) breach of express warranty; (2) breach of implied warranty; (3) violation of the Magnuson-Moss Warranty Act;[2] (4) unjust enrichment; and (5) fraudulent concealment.

On July 17, 2006, Mr. Bryant filed a motion for class certification. He never provided the circuit court with

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[2] The Magnuson-Moss Warranty Act in 15 U.S.C. §2301, *et seq.*, is a federal statute, but it simply incorporates the state law warranty standards that would otherwise be applicable. *E.g., Clemens v. DaimlerChysler Corp.*, 534 F.3d 1017, 2008 U.S. App. LEXIS 15949, *5-6 (9th Cir. 2008); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir. 1986).

any analysis of the state law or laws that should be applied to the millions of class members' claims. By contrast, GM argued that (1) the choice of law analysis in a nationwide class action involved due process and full faith and credit considerations, (2) the choice of law analysis had to be undertaken before certification, (3) under Arkansas choice of law principles, the laws of all 51 jurisdictions would apply, and (4) the certification requirements of commonality and predominance could not be satisfied if the laws of all 51 jurisdictions were applied.

After the parties each submitted draft findings of fact and conclusions of law with regard to class certification, the circuit court signed Mr. Bryant's version without any changes on January 11, 2007. App. at 36a-111a. The class certified by the circuit court was:

> "Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in Hat parking brake system utilizing a high force spring clip retainer, that registered his vehicle in any state in the United States.

Id. at 66a. With regard to the choice of law issue, the circuit court said "it would be premature for the Court, at this stage in the case, to make the call on choice of law." *Id.* at 91a. "[N]ow is not the time to decide whether the laws of multiple states will apply." *Id.* at 93a. Even though the circuit court had not examined what facts and legal issues would be relevant as a matter of law, it

concluded that a nationwide class could be certified because there were two common issues, under no particular law, for a classwide trial – whether the millions of vehicles had a "defect" and whether the defect was "concealed." *Id.* at 70a, 95a. The circuit court additionally determined that, after conducting a classwide trial on these two allegedly common issues in what the court called a "phase I" proceeding, a staggering array of individual issues for the millions of claims would then be tried over an undefined period of time in "phase II." *Id.* at 95a-99a (phase II would include, by way of example, whether a class member gave the required pre-suit notice, when a warranty expired, liability regarding leased vehicles, statute of limitations, whether GM had a duty to disclose to any given class member, reliance, and damages).

GM appealed the certification ruling directly to the Arkansas Supreme Court pursuant to Ark. S. Ct. Rule 1-2, and GM briefed the same choice of law issues that it had raised before the circuit court. The Arkansas Supreme Court affirmed the certification order in all respects on June 19, 2008. App. at 1a. It recognized that it was faced with a "question of first impression" in Arkansas – namely, "whether an Arkansas circuit court must first conduct a choice-of-law analysis before certifying a multistate class action." *Id.* at 11a.[3] The Court also recognized that many courts in other jurisdictions had previously determined that choice of law must be examined prior to certification. *Id.* at 12a-

[3] The Court acknowledged that GM "contends that a choice-of-law analysis must be conducted prior to certification" due to "due-process considerations." *Id.* at 6a.

13a. However, the Court declined to follow that approach and instead said that Arkansas courts need not conduct a choice of law analysis before nationwide certification because it would constitute a "rigorous analysis"[4] and a "merits" inquiry that would be inappropriate in Arkansas. *Id.* at 13a-14a. It also agreed with the circuit court that two alleged common issues – the existence of a "defect" and "concealment" of the defect – could be tried on a classwide basis before trying the individual issues. *Id.* at 9a, 12a. The Court did not address how "defect" and "concealment" could be common when no determination had been made about what facts and legal standards would be relevant as a matter of law to any class member's trial of those issues.

REASONS FOR GRANTING THE PETITION

I. A NATIONWIDE CLASS CERTIFICATION ORDER THAT FAILS TO ADDRESS THE CONSTITUTIONAL ISSUE OF CHOICE OF LAW IS REVIEWABLE BY THIS COURT.

This Court reviews "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." 28 U.S.C. § 1257(a). The Arkansas Supreme Court squarely rejected GM's argument that due process principles, as set forth by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), require a choice of law

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[4] The "rigorous analysis" requirement was established by this Court in *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982) (certification should be granted only if a court first conducts a "rigorous analysis" of the certification standards).

analysis before certification of a nationwide class. *See* section II.A., *infra*. That decision is final and cannot be revisited. As a result, there is no recourse, other than in this Court, to address the current situation — where a nationwide class has been certified by a fundamentally arbitrary process and millions of class members now must go through the constitutionally mandated notice and opt out process, and make binding decisions about their *res judicata* rights, when no one can yet tell them what their rights are. And, because the decision is now the law in Arkansas, it threatens the due process rights of litigants in other cases.

The imminent notice and opt out process highlights the need for this Court's immediate review. Like Fed. R. Civ. P. 23(c), Ark. R. Civ. P. 23(c) requires that the certified class must now receive "the best notice practicable under the circumstances," which notice must define the "class claims, issues or defenses," provide an opportunity for class members to "request[] exclusion," and explain "the binding effect of a class judgment on class members." As discussed in section II.A., *infra*, notice is an essential due process requirement and, because the governing legal standards here are undefined, class members are deprived of the opportunity to make an informed decision about whether to opt out. Moreover, GM is exposed to a classwide trial on millions of claims when, even if GM were to prevail, the trial could be subject to collateral attack by the absent class members due to the constitutionally deficient notice and opt out process.

Even if the Arkansas Supreme Court's decision were deemed interlocutory because it only resolved the

federal issues, and left non-federal issues for future proceedings, this Court has adopted a "pragmatic approach" in determining whether such state court decisions are subject to review under 28 U.S.C. § 1257(a). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). This Court is not bound by whether the state court deems the order "final." *Id.* at 479 n.8. Indeed, *Cox* recognized there are "at least four categories" of cases that are subject to review even when further proceedings remain to be held in state court. *Id.* at 477. This Court's flexible approach to determining jurisdiction is necessary to avoid "the mischief of economic waste and of delayed justice." *Id.* at 478.[5]

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[5] *Cox* found jurisdiction appropriate in several types of situations that are relevant here: where "there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another, the federal issue is conclusive or the outcome of further proceedings preordained"; where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings"; and where failure to review the issue "might seriously erode federal policy" because "the party seeking review might prevail on the merits on nonfederal grounds." *Id.* at 479-80, 482-83. In the present matter, from a practical perspective, the Arkansas Supreme Court's ruling will never come before this Court again as discussed below, and certainly not on the issue of whether constitutional principles require that choice of law be addressed prior to certification. Even if GM were to prevail on the merits on remand, that determination could be subject to collateral attack by absent class members as a result of the failure to have conducted the pivotal choice of law analysis at the certification stage. Yet the choice of law issue is essentially determinative here because, had a choice of law analysis been required, certification would have been denied due to the significant variations among the laws of the 50 states. *See* section II.C., *infra*.

Taking a "pragmatic approach" to the specific circumstances in the present matter, the Arkansas Supreme Court's opinion is ripe for review now. This case could never realistically make its way back to this Court because of the phased trial plan approved by the Arkansas courts – effectively backloading all issues of significance into potentially thousands or even millions of individualized trials to be conducted after the classwide trial. The initial phase would try the alleged common "defect" and "concealment" concepts and a second phase, or more, would consist of trials on the individualized issues that the circuit court recognized would need to be resolved before providing judgment to any of the millions of class members. As the circuit court described the procedure:

> [Phase II would] include, without limitation, whether an individual class member provided notice; when, if at all, a class member's warranty expired due to mileage; the type of ownership a given class member possesses (*e.g.*, purchase versus lease); and limitations-related issues. Warranty damages . . . can also be addressed during a "phase II" trial . . . The more individualized issues of whether GM owed a given class member a duty to disclose or whether a particular class member relied on GM's failure to disclose can be reserved for a "phase II" trial. The issue of damages can also be reserved for "phase II." . . . Finally, the equitable division of the disgorged sum amongst deserving class members can be reserved for a "phase II" trial.

App. at 97a-99a. This procedure is clearly not possible, and even were it possible, it would take countless years to complete.

Moreover, the reality is that the certification of a class creates tremendous settlement pressure. The certification decision itself often compels capitulation by some defendants unwilling to risk potentially huge liability given "the sheer magnitude of the risk to which the class action, in contrast to the individual actions pending or likely, exposes" the defendant. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (Posner, J.).[6] The pressure can exist "even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Class certification certainly enhances the value of unmeritorious claims, by making it more likely that defendants will be found liable for higher damage awards, and this is particularly true in a nationwide class

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[6] *See also* 15B Charles Alan Wright et al, *Federal Practice and Procedure* § 3914.19, at 56 (2d ed. 1992) ("Certification may impose enormously expensive burdens, and may make settlement imperative or impossible."); Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 Nw.U. L. Rev. 704, 705 (1997); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995); Joseph Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 963, 973 n. 38 (1994); William Simon, *Class Actions – Useful Tool or Engine of Destruction*, 55. F.R.D. 375, 389 (1972).

action.[7] Because the stakes are so high, an arbitrary certification process that denies the litigants fundamental due process rights calls for immediate review.

Finally, where important due process rights are at issue, like they are here, this Court has traditionally accepted review even when significant, additional state court proceedings are anticipated. The vindication in *Shaffer v. Heitner*, 433 U.S. 186, 195-96 n.12 (1977), of a right not to be forced to defend an action on the merits when jurisdiction was grounded solely on an improper seizure of property could not have been accomplished if the improper trial had to be conducted in order to seek review of this Court. Likewise, protection against undue assertions of personal jurisdiction, as in *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984), would be significantly diminished if one had to undergo the defective procedures in order to challenge them. *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 47-50 (1987) (Sixth Amendment rights); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (arbitration preemption); *Rush v. Savchuk*, 444 U.S. 320, 324 (1980) (quasi in rem jurisdiction). The rights at stake here are at least as fundamental.

This Court should grant review of the Arkansas Supreme Court's ruling. The federal question regarding the constitutionality of the state court's proposed

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[7] *See Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987)); Kenneth S. Bordens and Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989)).

adjudication of millions of claims in a nationwide class without reference to or regard for applicable law is significant. Where federal policies affecting the scope and form of litigation are at issue, it serves the underlying policy of finality to determine now what due process rights are required rather than to subject the litigants "to long and complex litigation which may all be for naught if consideration of the preliminary question . . . is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *see also Southland Corp.*, 465 U.S. at 7-8 (noting that delayed review of a state decision denying enforcement of an arbitration contract would defeat the core purpose of a contract to arbitrate).

II. THE FAILURE TO CONDUCT A CHOICE OF LAW ANALYSIS BEFORE CERTIFYING A NATIONWIDE CLASS ACTION VIOLATES THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES.

Due process and full faith and credit principles require the determination of the applicable law or laws in a nationwide class action predicated upon state law prior to certification. The substantive law is the lens through which every aspect of the certification decision is to be viewed because it defines the legal and factual questions raised by the class members' claims. As a result, courts necessarily must tackle the choice of law issue at the certification stage by "determining on an individual basis which state has a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

The Arkansas Supreme Court's decision to ignore the choice of law issue offends the constitutional notion of fundamental fairness. It adds a standardless dimension to the class certification equation, and it frustrates the justifiable expectations of the parties by injecting arbitrariness, uncertainty, lack of notice, and unfair surprise into the proceedings. "A choice of law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice of law decisions under the Due Process Clause." *Hague*, 449 U.S. at 327 (Stevens, J., concurring).

A. Choice of Law Must be Analyzed Before Certifying a Nationwide Class.

This Court addressed choice of law in the context of a nationwide class action in the *Shutts* case. There, the state court at least had made a choice of law decision, albeit one that this Court determined was arbitrary. Here, the state court's choice of law approach was even more arbitrary by refusing to address it at all.

Shutts was a class action brought by a group of 28,000 royalty owners who lived in all 50 states. 472 U.S. at 799, 801. The plaintiff class attempted to apply the law of Kansas to all of the class members' claims in order to facilitate certification of a nationwide class, but this Court rejected that effort. *Id.* at 814-23. This Court made clear it was a violation of the Due Process and the Full Faith and Credit Clauses for a state law to be applied to a class member's claim unless the state had "significant contact or aggregation of contacts" to the

claim. *Id.* at 818. *See also Hague*, 449 U.S. at 310-11 ("if a state has only insignificant contact with the parties and the . . . transaction, application of its law is unconstitutional"). This Court held in *Shutts* that these constitutional considerations require that the state law to be applied to each class member's claim must be "neither arbitrary [n]or fundamentally unfair." 472 U.S. at 821. "When considering fairness in this context, an important element is the expectation of the parties." *Id.* at 822. *Shutts* emphasized that "constitutional limitations [on choice of law] must be respected even in nationwide class actions." *Id.* at 821. Constitutional limitations on the choice of law are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions" sought to be adjudicated. *Id.*

This Court subsequently confirmed the central importance that the choice of law analysis plays in ensuring due process *during the certification process* in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In *Amchem*, the "differences in state law" were, indeed, so significant as to indicate that the claims were not predominant and the class action vehicle not superior, rendering the class unfair and unmanageable. *Id.* at 624 (referencing *Shutts*). Accordingly, this Court affirmed the Third Circuit's decertification of a settlement class for several reasons including, specifically, because the trial court failed to "apply an individualized choice of law analysis to each plaintiff's claims." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) (referencing *Shutts* and noting that "constitutional limitations on choice of law apply even in nationwide class actions"), *aff'd*, 521 U.S. 591 (1997).

As noted, the present case involves an even more fundamental problem than *Shutts*. The state court in *Shutts* made a choice of law decision – an arbitrary one. The Arkansas Supreme Court went one step beyond that by making the arbitrary decision to ignore choice of law altogether. It simply assumed, without examining choice of law, that two slivers of some of the elements of the state law claims – defect and concealment – must be common across the millions of class members. But as discussed below (*see* section II.C., *infra*), that assumption is incorrect inasmuch as state laws vastly differ on even these concepts. The Arkansas Supreme Court's choice of law approach is "so vague and open ended to the point where [it] risk[s] arbitrary results." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring). Similarly, it offends the constitutional notion of fundamental fairness as a result of "the inconvenience and expense involved, . . . the idea of unfair surprise, . . . the anticipation of an improper choice of law, and . . . general notions of the limits of a state's rightful sovereignty." *In-flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 (6th Cir. 1972) (quoting Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 Univ. of Ill. L.F. 533, 535).

The predicament the parties now face with the required class notice is just one example of the arbitrariness resulting from a failure to require a choice of law analysis before certification. As noted above in section I, Ark. R. Civ. P. 23(c) requires, as does Fed. R. Civ. P. 23(c), that all class members must be provided with "notice" that defines the "class claims, issues or defenses" and the opportunity to opt out of the class.

This Court has made abundantly clear that notice and opt out procedures are a matter of due process since class members will be bound by any final judgment. *Shutts*, 472 U.S. at 812; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974). "The essence of due process is that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case." *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1103 (5th Cir. 1977) (citation and quotations omitted). *See also Berardinelli v. General Am. Life Ins. Co. (In re Gen. Am. Life. Ins. Co. Sale Practices Litig.)*, 357 F.3d 800, 804 (8th Cir. 2004) (stating, in the context of a class action, that "[t]he most important element of due process is adequate notice."). Notice requires that the class members' "substantive claims must be adequately described" and that class members have opportunity to receive "information reasonably necessary to make a decision to remain a class member and be bound by the final judgment." *Nissan*, 552 F.3d at 1104-05.

Without knowing the substantive law or laws that control any class member's claims, class members cannot make an informed judgment about whether to remain a member of the class. The Arkansas Supreme Court's ruling has the effect of forcing class members to effectively gamble by making them guess at the substantive rights at issue and whether those undefined rights should be subjected to *res judicata*. It also has the effect of forcing GM to trial, on millions of claims, that class members could collaterally attack on the ground that notice was constitutionally insufficient. "[T]he class-action defendant has a great interest in

ensuring that the absent plaintiffs' claims are properly before the forum." *Shutts*, 472 U.S. at 809. GM must be assured that if it prevails at the classwide trial, then it will not thereafter be subjected to claims by class members who argue that the notice and opt out process was constitutionally defective.

B. The Split Among the Courts on This Important Issue Should Be Settled.

Although this Court has emphasized the importance of choice of law in ensuring due process, this Court has yet to speak directly to whether a choice of law analysis is constitutionally required at the certification stage. Numerous lower courts have concluded, under the principles enunciated in *Shutts*, that a court considering the certification of a nationwide class has the duty to examine the potential legal variations at the certification stage.[8] Other courts have taken a contrary

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[8] *In re St. Jude Medical, Inc.*, 425 F.3d 1116,1120 (8th Cir. 2005) (class certification reversed because due process clause and full faith and credit clause require an individualized choice of law analysis before certification); *In re Prempro Products Liability Litigation*, 230 F.R.D. 555, 561-62 (E.D. Ark. 2005) ("Not only must the choice-of-law issue be addressed at the class certification stage — it must be tackled at the front end since it pervades every element of [Rule]23" and "in nationwide class actions, choice-of-law constraints are constitutionally mandated because a party has a right to have her claims governed by the state law applicable to her particular case."); *Yadlosky v. Grant Thornton, L.L.P.* 197 F.R.D. 292, 300 (E.D. Mich. 2000) ("Due process requires individual consideration of the choice of law issues raised by each class member's case before certification.") *Chin v. Chrysler Corp.*, 182 F.R.D. 448, (Cont'd)

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457 (D.N.J. 1998) (Due process requires consideration of "the choice-of-law issues . . . before certification."); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217,222-23 (W.D. Mich. 1998) ("In addressing the certification question, the Court is required to determine whether variations in state law defeat predominance . . . Indeed, the choice-of-law analysis is a matter of due process and is not to be altered in a nationwide class action simply because it may otherwise result in procedural and management difficulties."); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371-72 (E.D. La. 1997) (refusing to certify nationwide class action after relying on *Shutts*); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 174 F.R.D. 332, 347-48 (D.N.J. 1997) ("due process requires individual consideration of the choice of law issues" in a nationwide class action); *Ex parte Citicorp Acceptance Co*, 715 So.2d 199, 204 (Ala. 1997) (decertifying nationwide class action after citing *Shutts*). *See also Castano*, 84 F.3d at 741, 750 ("A requirement that a court know which law will apply before making a predominance determination is especially important when there maybe differences in state law."); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (In order to establish commonality of the applicable law, nationwide class action movants must credibly demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.'") (Ginsberg, J.) (quoting *In re Asbestos School Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)); *Andrews v. American Tel. and Tel. Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (decertifying class because of issues "compounded by the necessity of referencing fifty sets of . . . consumer protection law"); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (reversing certification of nationwide class because "[i]f more than a few of the laws of the fifty states differ, the district court would face an impossible task of instructing a jury on the relevant law"); *Washington Mutual Bank, F.A. v. Superior Court*, 24 Cal.4th 906, 926, 15 P.3d 1071, 1085, 103 Cal.Rptr.2d 320, 335 (2001); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004).

view.[9] Indeed, the Arkansas Supreme Court in this case recognized that its decision conflicted with a long line of cases. App. at 12a-13a. Nevertheless, the Arkansas court held "we are simply not persuaded by the reasoning of these courts as we have previously rejected any requirement of a rigorous-analysis by our circuit courts." *Id.* at 13a. This Court should take this opportunity to resolve this conflict.

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[9] In addition to the Arkansas Supreme Court, the following courts have declined to decide choice of law incident to a motion for class certification. *Steinberg v. Nationwide Mut. Ins. Co.*, 224 F.R.D. 67, 78 (E.D.N.Y. 2004) (discussing *Shutts* and deciding that choice of law need not be addressed prior to certification); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691 (S.D. Fla. 1998) ("It is well-established that consideration of choice of law issues at the certification stage is generally premature."); *Kline v. First W. Gov't Secs.*, 1996 U.S. Dist. LEXIS 4019 (E.D. Pa. Mar. 14, 1996); *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) (declining to decide choice of law question at class certification); *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 103 (M.D.N.C. 1993); *In re United Telecommunications, Inc. Sec. Litig.*, 1992 U.S. Dist Lexis 16580 (D. Kan. 1992) (same); *Walsh v. Chittenden Corp.*, 798 F.Supp. 1043, 1055 (D. Vt. 1992) (same); *Raytech Corp. v. White* 1991 U.S. Dist Lexis 19755 (D. Conn. Aug. 28, 1991) (any choice of law analysis at certification would be premature); *In re. Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 84 (D. Md. 1991) (it is inappropriate to decide choice of law incident to a motion for class certification); *In re: Lilco Sec. Litig.*, 111 F.R.D. 663, 670-71 (E.D.N.Y. 1986) (at certification it is not necessary to decide choice of law); *Peterson v. Dougherty Dawkins, Inc.*, 583 N.W.2d 626, 630 (N.D. 1998); *Lobo Exploration Co. v. Amoco Production Co.*, 991 P.2d 1048, 1051 (Okla. App. 1999) (*Shutts* does not require resolution of choice of law before certification).

C. The Choice of Law Analysis is Critical Here Because the State Laws Differ Significantly with Regard to the Standards and Burdens of Proof for "Defect" and "Concealment"

The Arkansas Supreme Court attempted to slice the causes of action alleged (*i.e.*, express warranty, implied warranty, the Magnuson-Moss Warranty Act, unjust enrichment, and fraudulent concealment) to their simplest elements to find a common issue that presumably could be tried without a choice of law analysis. The Court assumed that "defect," an element of the warranty claims, and "concealment," an element of the fraud claim, could be tried by application of some unidentified, uniform standard. Pretermitting the impossibility of trying a single element of a claim without context to the nuances of the causes of action, there are no universally accepted standards or burdens of proof for "defect" or "concealment" – meaning there is no uniformity with regard to the facts or legal issues across the class. These differences, which GM outlined for the Arkansas courts as well, highlight that a choice of law analysis at the certification stage is necessary to avoid arbitrary results.[10]

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[10] Under Arkansas choice of law principles, the laws of all 51 jurisdictions would apply inasmuch as the key choice of law consideration in Arkansas is a state's interest in protecting its own citizens from the sale of defective products within that state. *E.g.*, *Ganey v. Kawasaki Motors Corp.*, 366 Ark. 238, 250-52, 234 S.W.3d 838 (Ark. 2006). That is same choice of law approach in most other states. *E.g.*, *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *Chin*, 182 F.R.D. at 456-57.

1. Defect

Courts have overwhelmingly determined that nationwide warranty claims cannot be certified because of the variations among state warranty laws.[11] Even if one were to focus on just the states that have adopted the Uniform Commercial Code for warranty claims, and its governing "defect" standard of whether a product is "merchantable," the variations are broad and deep.[12]

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[11] *See, e.g., Cole v. General Motors Corp.*, 484 F.3d 717, 725-30 (5th Cir. 2007); *Bridgestone*, 288 F.3d at 1018; *In re General Motors Corp. Dex-Cool Prod. Liab. Litig.*, 2007 U.S. Dist. LEXIS 11432, *68 (S.D. Ill. Feb. 16, 2007); *Cox House Moving, Inc. v. Ford Motor Co.*, 2006 U.S. Dist. LEXIS 81132, *17-18 (D.S.C. Nov. 6, 2006); *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 194 F.R.D. 484, 489-90 (D.N.J. 2000); *Chin*, 182 F.R.D. at 456-62; *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. at 369; *Ford Ignition Switch*, 174 F.R.D. at 348-51; *Barbarin v. General Motors Corp.*, 1993 U.S. Dist. LEXIS 20980, *10 (D.D.C. Sept. 22, 1993); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-77 (D.D.C. 1990); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F.Supp. 595, 604 (S.D.N.Y. 1982); *Gordon v. Ford Motor Co.*, 687 N.Y.S.2d 369, 370 (N.Y. App. 1999). Among the variations noted by these cases are whether notice of breach is required, whether reliance is an element of the claim, whether a failure to repair under warranty is simply a breach of a residual promise of repair, the different standards for merchantability, the different standards for used car sales, the standards for merchantability in leases, the presumptions of merchantability, the enforceability of warranty limitations, whether a plaintiff can recover for an unmanifested product defect, and whether privity is an impediment to a warranty claim.

[12] As an example of a state that does not follow the U.C.C. merchantability standard, Louisiana has two different (Cont'd)

In Arkansas the "defect" standard is whether the goods are "fit for [their] ordinary purpose."[13] In Delaware, courts focus on the "ordinarily prudent [manufacturer]."[14] By contrast, Massachusetts focuses on the "expectations" of the "reasonable consumer."[15] New York follows yet another approach, focusing at least in part on the expectations of the particular plaintiff.[16] Yet, other courts have looked to whether plaintiffs would suffer similar problems with other products on the

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standards for breach of warranty. The first applies when a "defect" makes a product "useless," and the other applies when a "defect . . . diminishes [the product's] usefulness." La. Civ. C. art. 2520.

[13] *Purina Mills v. Askins*, 317 Ark. 58, 65, 875 S.W.2d 843 (Ark. 1994).

[14] *Nacci v. Volkswagen of America, Inc.*, 325 A.2d 617, 620 (Del. Super. Ct. 1974) (in a design defect case, the merchantability standard is "whether the design has created a risk of harm which is so probable that an ordinarily prudent person, *acting as a manufacturer*, would pursue a different available design which would substantially lessen the probability of harm") (emphasis added).

[15] *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 190 (1st Cir. 1980) ("[u]nder Massachusetts law the question of fitness for ordinary purposes is largely one centering around reasonable *consumer* expectations") (emphasis added).

[16] *See Denny v. Ford Motor Co.*, 639 N.Y.S.2d 250, 258-63 (1995) (implied warranty "inquiry focuses on [consumer] expectations" and the 'ordinary purpose' for which the product was marketed and sold to "the plaintiff").

market.[17] Numerous other courts look to the ordinary purpose of a product.[18] Still other standards have been employed.[19] Further confusing the issue is that some

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[17] *See Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62, 66 (Tex. App. Houston 1st Dist. 1998) ("Baker produced no evidence that Harris's failure to provide a warning caused its product to fall below the quality generally acceptable in that trade."), *overruled in part on other grounds, Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55 (Tex. 2008); *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 107 (3d Cir. Pa. 1991) (finding that "Wyse introduced undisputed testimony that a user would encounter the same compatibility problems when using the [multi-user system] . . . offered by Wyse's primary competitors" and that since "[Wyse established that the multi-user system] conformed to industry standard . . . the evidence of incompatibility . . . is not sufficient to support a finding that Wyse breached the implied warranty of merchantability."); *Lancaster Glass Corp. v. Philips ECG, Inc.*, 835 F.2d 652, 661-62 (6th Cir. 1987) (finding that "Lancaster did not breach implied warranty of merchantability even though bulbs were not perfectly suited for new technology because bulbs conformed to contract and Lancaster tendered the kind of bulbs typically tendered.").

[18] *See Vision Graphics, Inc. v. E.I. Du Pont de Nemours & Co.*, 41 F. Supp. 2d 93, 99 (D. Mass. 1999) (court found that plaintiffs' claim that computer software was not merchantable was based on "a condition that is neither set forth in the written contract nor properly considered as an 'ordinary purpose' for which such system was intended."); *Right Weigh Scale Co. v. Eaton Corp.*, 998 F.2d 287, 289 (5th Cir. 1993) ("No evidence in the record establishes that these units were defective when used for the ordinary purposes for which [they were intended].").

[19] *See Horne v. Claude Ray Ford Sales, Inc.*, 290 S.E.2d 497, 499 (1982) (damage to a new car that does not affect a vehicle's

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courts occasionally treat warranty actions as tort (similar to a strict liability standard).[20] Whereas, some states treat the claim as fundamentally contractual.[21]

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"usefulness . . . or driveability" will not affect merchantability); *Welch v. Fitzgerald-Hicks Dodge*, 430 A.2d 144, 148 (N.H. 1981) (unmerchantable vehicle is "not of average quality or fit for the ordinary purpose for which an automobile is used"); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989) (holding that "[i]n the context of an implied warranty of merchantability case the word 'defect' means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy").

[20] *See, e.g., Higgins v. General Motors Corp.*, 287 Ark. 390, 391, 699 S.W.2d 741 (Ark. 1985) ("[a]s these two elements of a strict liability case are essentially the same required in a breach of warranty case, we will discuss the evidence in terms of strict liability"); *Camacho v. Honda Motor Co.*, 701 P.2d 628, 632 (Colo. Ct. App. 1985) ("[i]n any products liability case, regardless of whether recovery is sought under a theory of strict liability, negligence, or breach of an implied warranty, in order to impose liability on the manufacturer of a product, the complaining party must establish that the product causing the injury or damage was unreasonably dangerous because of a defect"), *rev'd on other grounds*, 741 P.2d 1240, 1242 n.3 (Colo. 1987); *First Nat'l Bank v. Regent Sports Corp.*, 803 F.2d 1431, 1438 (7th Cir. 1986) ("[I]n Illinois . . . the issue in a products liability suit brought on breach of warranty is essentially the same as one brought under strict tort liability theory").

[21] *See, e.g., Parrillo v. Giroux Co.*, 426 A.2d 1313, 1317 (R.I. 1981) (implied warranty and strict liability are distinct, "one in contract and the other in tort, with each having its separate

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States also vary as to the specificity with which a defect must be proven in a warranty case.[22] In many

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analytical elements"). Predictably, such differences in approach lead to concrete differences in state rules. For example, courts holding breach of warranty to be tortious in nature often allow defendants to raise tort affirmative defenses of contributory negligence, assumption of risk, and product misuse. *See, e.g., Stephan v. Sears, Roebuck & Co.*, 266 A.2d 855, 858 (N.H. 1970). Courts adopting a contract characterization sometimes refuse to allow these defenses. *See, e.g., Holt v. Stihl, Inc.*, 449 F. Supp. 693, 694-95 (E.D. Tenn. 1977).

[22] *See, e.g., Ford Motor Co. v. General Accident Ins. Co.*, 365 Md. 321, 333 (2001) (In action arising when tow truck caught fire, "[t]he Court of Special Appeals erred in holding that proof of a specific product defect is not required to maintain a claim for breach of the implied warranty of merchantability."); *Firestone Tire & Rubber Co. v. Jackson Transp. Co.*, 191 S.E.2d 110, 113 (Ga. App. 1972) ("the mere fact of a tire blowout does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective"); *Bailey v. Le Beau*, 339 S.E.2d 460, 461-63 (N.C. App. 1986) (evidence that used car engine blew up, rendering car "inoperable" 15 days after purchase is insufficient evidence defect existed at time of sale to submit case to jury), *modified on other grounds*, 348 S.E.2d 524 (1986); *Scittarelli v. Providence Gas Co.*, 415 A.2d 1040, 1046 (R.I. 1980) ("proof that the oven door opened [improperly] does not tend to establish that the stove was defective"); *Plouffe v. Goodyear Tire & Rubber Co.*, 373 A.2d 492, 496 (R.I. 1977) (in a scrupulously maintained automobile with under 4,000 miles on it "[t]he mere fact of a tire blowout does not tend to establish that the tire was defective"); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989) (defectiveness must be shown in an implied warranty of merchantability action, however, it may be shown by circumstantial evidence); *Feinstein v. Firestone*
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jurisdictions, claimants would be required to prove a defect with specificity. By contrast, other states have apparently rejected the need for a specific showing of a defect to recover in warranty.[23] These differing

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Tire & Rubber Co., 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (court rejected class certification on basis that majority of class members could not show existence of defect with respect to their individual tires. "Plaintiffs' bald assertion that a 'common' defect which never manifests itself 'ipso facto caused economic loss' and breach of implied warranty is simply not the law."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 124 (N.Y. App. Div. 1st Dep't 2002) (same); *Hayles v. GMC*, 82 F. Supp. 2d 650, 659 (S.D. Tex. 1999) ("A plaintiff in an implied warranty of merchantability case must prove that the good complained of was defective at the time it left the manufacturer's or seller's possession.").

[23] *See Dickerson v. Mountain View Equip. Co.*, 710 P.2d 621, 626 (Idaho Ct. App. 1985) ("[a]lthough the existence of a defect normally supports the finding of a breach of an implied warranty of merchantability . . . such a requirement may unduly restrict the examination of a product's merchantability"); *Meldco, Inc. v. Hollytex Carpet Mills*, 796 P.2d 142, 146 (Idaho Ct. App. 1990) (court held that circumstantial evidence was sufficient to show unmerchantability and no proof of a manufacturing defect was required); *Todd Farm Corp. v. Navistar International Corp.*, 835 F.2d 1253, 1255 (8th Cir. 1987) (Iowa law) (plaintiff "need not prove any one specific defect"); *Roe Roofing, Inc. v. Lumber Products, Inc.*, 688 P.2d 425, 428 (Ore. App. 1984) (defect "could be proved circumstantially by evidence that plaintiff used the product in a normal fashion"); *Colorado Serum Co. v. Arp*, 504 P.2d 801, 805-06 (Wyo. 1972) ("there would seem to be no requirement that the allegedly defective product must be presented in evidence and be shown by analysis to be ipso facto

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approaches to the defect requirement are reflected in the states' model jury instructions. For example, in Hawaii, the jury must be instructed that: "If a product is 'defective' for purposes of strict products liability, *it is automatically not fit for its ordinary purpose.*"[24] In contrast, other jurisdictions, like Illinois, would not so instruct the jury because, under their law, breach of warranty and strict products liability are fundamentally different causes of action.[25]

These distinct formulations from different states are just on the threshold concept of "defect." Neither the Due Process Clause nor the Full Faith and Credit Clause permit Arkansas to apply some unidentified, presumptively universal standard to the determination of "defect" in abrogation of the justifiable expectations of the parties that their claims will be governed by law with a "significant contact or significant aggregation of

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defective . . . [s]uch proof is permissible by circumstantial evidence"); *Ragland Mills, Inc. v. General Motors Corp.*, 763 S.W.2d 357, 360 (Mo. Ct. App. 1989) ("The showing of specific defects in goods is obviously one way in which a buyer can establish that a seller has sold goods that are not merchantable and thus, breached this implied warranty. This, however, is not the only way in which a buyer may show a breach of this implied warranty.") (quoting *Worthey v. Specialty Foam Products, Inc.*, 591 S.W.2d 145, 149 (Mo. Ct. App. 1979)).

[24] Hawaii Civil Jury Instructions No. 13.2 (1999) (emphasis added).

[25] 1-34 Illinois Forms of Jury Instruction § 34.153, cmt. (emphasis added).

contacts to the claims asserted by each member of the class." *Shutts*, 472 U.S at 821.

2. Concealment

The law of fraud is materially different in the 51 jurisdictions at issue, and thus courts have overwhelmingly denied nationwide certification of such claims.[26] Even something as basic as the burden of proof for fraud differs dramatically. Many states allow for recovery if fraud is proven by a "preponderance of the evidence."[27] Many other jurisdictions, however, require

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[26] *See, e.g., Bridgestone*, 288 F.3d at 1018; *Castano*, 84 F.3d at 743 n. 15; *Lewis Tree Service, Inc. v. Lucent Technologies*, 211 F.R.D. 228, 236 (S.D.N.Y. 2002); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 222-23 (E.D. La. 1998). These differences include the standards for concealment, burdens of proof, materiality, reliance, the requisite knowledge of the defendant that triggers fraud, and the duty to disclose.

[27] *Compagnie de Reassurance D'ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 72 (1st Cir. 1995) (applying Massachusetts law); *Denuptiis v. Unocal Corp.*, 63 P.3d 272, 277 (Alaska 2003); *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 580 (Ark. 2002); *Caldwell v. Armstrong*, 642 P.2d 47, 50 (Colo. Ct. App. 1981); *In re IBP S'holders Litig. v. Tyson Foods, Inc.*, 789 A.2d 14, 54 (Del. Ch. 2001); *Wieczoreck v. H & H Builders, Inc.*, 475 So. 2d 227, 228 (Fla. 1985); *Massey v. Stembridge*, 341 S.E.2d 247, 249 (Ga. App. 1986); *Terre Haute Regional Hospital, Inc. v. Basden*, 524 N.E.2d 1306, 1311 (Ind. Ct. App. 1988); *Opti-Flow, LLC v. Prod. Servs. Int'l*, Ltd., 903 So. 2d 1171, 1175 (La. App. 3 Cir. June 1, 2005); *Artilla Cove Resort v. Hartley*, 72 S.W.3d 291, 295-96 (Mo. Ct. App. 2002); *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791 (Minn. 1993); *Barrett v. Holland & Hart*, 845 P.2d 714, 717 (Mont. 1992); *Bulbman, Inc.*
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proof by the heightened standard of "clear and convincing evidence."[28] Two states (South Carolina and Washington) apply a "clear, cogent and convincing" standard.[29] And still other states apply some hybrid or

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v. Nevada Bell, 825 P.2d 588, 592 (1992); *Poe v. Lennon*, 89 S.E. 1003, 1005 (N.C. 1916); *Ostalkiewicz v. Guardian Alarm, Div. of Colbert's Sec. Servs.*, 520 A.2d 563, 569 (R.I. 1987); *Speck v. Anderson*, 349 N.W.2d 49, 50 (S.D. 1984); *Capital Management Partners v. Eggleston*, 2005 WL 1606066, at *7-9 (Tenn. Ct. App., Jul 7, 2005); *Browder v. Eicher*, 841 S.W.2d 500, 502-03 (Tex. App. Houston 14th Dist. 1992).

[28] *See Prado-Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 76-77 (D.P.R. 2004); *Jones v. Estelle*, 348 So. 2d 479, 481 (Ala. 1977); *Black v. Goodwin, Loomis & Britton, Inc.*, 681 A.2d 293, 303 (1996); *Va. Acad. of Clinical Psychologists v. Group Hospitalization & Med. Servs.*, 878 A.2d 1226, 1233 (D.C. 2005); *Shoppe v. Gucci Am., Inc.*, 94 Haw. 368, 14 P.3d 1049, 1067 (Haw. 2000); *Lindberg v. Roseth*, 137 Idaho 222, 46 P.3d 518, 521-22 (Idaho 2002); *Rand v. Bath Iron Works Corp.*, 832 A.2d 771, 773 (Me. 2003); *Gorman v. Soble*, 328 N.W.2d 119, 124 (1982); *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 762 (Miss. 2004); *Snow v. American Morgan Horse Ass'n*, 686 A.2d 1168, 1170 (N.H. 1996); *Golden Cone Concepts v. Villa Linda Mall*, 820 P.2d 1323, 1328 (N.M. 1991); *Heart River Partners v. Goetzfried*, 703 N.W.2d 330, 339 (N.D. 2005); *Rogers v. Meiser*, 2003 OK 6, 68 P.3d 967, 977 (Okla. 2003); *Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1179 (2001); *Hardwick-Morrison Co. v. Albertsson*, 605 A.2d 529, 531 (Vt. 1992); *State Farm Mut. Auto. Ins. Co. v. Remley*, 618 S.E.2d 316, 321 (Va. 2005); *Lundin v. Shimanski*, 368 N.W.2d 676, 680-81 (Wis. 1985); *Bitker v. First Nat'l Bank*, 2004 WY 114, 98 P.3d 853, 856 (Wyo. 2004).

[29] *See Cowburn v. Leventis*, 619 S.E.2d 437, 446 (S.C. App. 2005) ("'Each and every element [of fraud] must be proven by (Cont'd)

variant formulation.[30] As the Third Circuit cautioned, charging the jury with the wrong burden of proof in a fraud action is fundamental error. *See Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23, 27 (3d Cir. 1981) ("[A] new trial is necessary because of fundamental error committed in the charge on the burden of proving fraud.").

There is no basis in fact or law for the Arkansas Supreme Court's hypothesis that "concealment" is an issue that can be determined by an unarticulated, universally accepted standard. This arbitrary approach does not comport with Due Process and Full Faith and Credit principles.

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clear, cogent, and convincing evidence.'") (citation omitted); *Stiley v. Block*, 925 P.2d 194, 204 (1996) (en banc) ("Each element of fraud must be established by 'clear, cogent and convincing evidence.'") (citation omitted).

[30] *See Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 64 (Iowa 2004) ("Our law is clear that all the elements of common-law fraud must be established by a preponderance of evidence that is clear, satisfactory, and convincing. . . . '[C]lear and satisfactory' refers to the *character or nature of the evidence*, whereas 'preponderance' of the evidence is a *quantitative measure*.") (emphasis added) (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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